In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-250

FATHER FLANAGAN'S BOYS' HOME,

Petitioner,

v.

MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT NO. 17 OF DOUGLAS COUNTY, NEBRASKA; ROBERT BARTELS; LOWELL BOETGER; HOUGHSTON TETRICK; ROBERT ACKERMAN; DONNA BLACK; CHARLES HASKINS; JAMES H. MOYLAN; WILLIAM L. OTIS; and JOSEPH KIRSHENBAUM,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

The petitioner, FATHER FLANAGAN'S BOYS' HOME, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Nebraska entered in this proceeding on June 2, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska, reported at 196 Neb. 299, 242 N. W. 2d 637, appears at Appendix A, page 21, *infra*. The unreported Memorandum of the District Court of Douglas County, Nebraska appears at Appendix B, page 27, *infra*. The Judgment and Injunction of the District Court of Douglas County, Nebraska appears at Appendix C, page 32, *infra*.

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JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on June 2, 1976. The Mandate of the Supreme Court of Nebraska appears at Appendix D, page 34, *infra*. The petitioner's timely Motion for Rehearing was denied by order of the Supreme Court of Nebraska on July 23, 1976. *See* Appendix E, page 35, *infra*. A timely application for Order Staying Issuance of the Mandate was denied by Order of the Supreme Court of Nebraska on July 23, 1976. *See* Appendix F, page 36, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

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QUESTIONS PRESENTED

The petitioner brought an action for injunction in the District Court of Douglas County, Nebraska to prevent condemnation of its property by Millard School District,

District No. 17 of Douglas County, Nebraska. The questions thereby arising are:

1. Whether the condemnation power of a state and its political subdivisions is limited by rights of citizens guaranteed by the Constitution of the United States.

2. Whether the constitutional right of citizens to give their children a private rather than public education prevents condemnation of private school property for use as a public school.

3. Whether the tract sought to be condemned is used for private educational purposes.

4. Whether Millard School District has a need for property for use as a public school site.

5. Whether Millard School District must make some showing of nonavailability of alternative sites before condemning private school property for use as a public school.

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CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Constitution of the United States Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

I.

The Federal Question

This case involves the issue of whether a public school district has the absolute discretion without considering reasonable alternative sites to condemn, for construction of a public school, property in use for private school purposes. The petitioner brought an action for injunction in the District Court of Douglas County, Nebraska, to prevent condemnation of its property by Millard School District, District No. 17 of Douglas County, Nebraska, on the ground that condemnation would interfere with the petitioner's rights under the Fourteenth Amendment to the Constitution of the United States and under the Constitution of the State of Nebraska, and the rights of school children and parents of school children whom the petitioner represents, to give children a private rather than public education. The federal question was timely and properly raised. In its Petition in the District Court of Douglas County, Nebraska (T1-2, 3)[1] the petitioner stated as part of its first cause of action that:

> 7. Condemnation of said property for purposes of public education would establish a priority of public education over private, in contravention of the constitutional rights of the minor students presently enrolled in the schools of Father Flanagan's Boys' Home to the alternative of a private education, and of the parents and guardians of said children to educate their children in a private educational institution.

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1 References herein to the Transcript (the Permanent Record of the Supreme Court of Nebraska) are made by setting forth in parentheses the capital letter T followed by the page of the Transcript.

In its Reply Brief In Support of Application for Injunction (T44, 46), the petitioner stressed that:

> The cornerstone of the American legal system is the principle that the Constitution of the United States is the supreme law of the land. *See Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803). The power to condemn therefore must be subject to the limitations of the Constitution to the same extent as any other power of the state.

On December 31, 1975, after a trial before the Court, the District Court of Douglas County, Nebraska found that the subject property was in use by a private school for educational purposes (T51, 52). *See* Appendix B, page 27, *infra*. It held that the Millard School District's statutory power to condemn was not absolute but was limited by the right of citizens to educate their children privately, rather than in public schools, to the extent that the School District must show that no reasonable alternate means exists to accomplish its purpose. In his Memorandum, the District Court Judge stated:

> This absolutist position [of the Millard School District] fails to take into consideration conflicting constitutional rights which must be balanced. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. *United States v. Wunderlich*, 342 U. S. 98, 101.
>
> This absolutist position raises interesting questions.
>
> If the School District's absolutist position were carried to its obvious conclusion, it would seem that, at best, it would hobble forward with backward glances. For example, what would prohibit the Board of Regents of the University of Nebraska from condemning Creighton University? Does the City of

> Omaha have the absolute discretion to condemn the Methodist Hospital for park purposes? What if the School District in Washington County decided that it would prefer a complex of public schools where Dana College[2] now stands (T51, 52-53)? *See* Appendix B, page 27, *infra.*

The District Court offered the respondents their choice of making such a showing or having an injunction entered against them. The respondents chose to have the injunction entered. On January 9, 1976, the District Court issued a Judgment and Injunction staying condemnation proceedings against the subject property and permanently enjoining Millard School District from prosecuting condemnation proceedings against the subject property (T61). *See* Appendix C, page 32, *infra.*

By an opinion filed June 2, 1976, the Supreme Court of Nebraska reversed the judgment of the District Court in granting the permanent injunction, and remanded the cause with directions to vacate the injunction and dismiss the action. *See* Appendix A, page 21, *infra.*

On June 18, 1976 the petitioner filed in the Supreme Court of Nebraska a Motion for Rehearing and an Application for Order Staying Issuance of the Mandate. In its Brief in Support of Motion for Rehearing and Showing that a Federal Question is Involved, the petitioner set forth the following Assignments of Error:

> 1. This Court erred in holding that the only constitutional limitations upon the exercise of the power of eminent domain are that the use must be

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2 Creighton University and Dana College are both private educational institutions.

> public, just compensation must be paid and due process of law observed.
>
> 2. This Court erred in failing to apply the limitations of the "liberty clause" of the Fourteenth Amendment to the Constitution of the United States to the exercise of the power of eminent domain in the present case.
>
> 3. This Court erred in concluding, with no support by the record, that the loss of the 40-acre tract of farmland owned by the appellee would not interfere substantially in any way with the operation of the appellee's school program.

On July 23, 1976, the petitioner's Application for Order Staying Issuance of the Mandate and the petitioner's Motion for Rehearing were denied by order of the Supreme Court of Nebraska. *See* Appendix E, page 35, *infra,* and Appendix F, page 36, *infra.* The Mandate of the Supreme Court of Nebraska was issued on July 23, 1976. *See* Appendix D, page 34, *infra.*

The petitioner's application to Mr. Justice Blackmun Circuit Justice of the Eighth Circuit, for a Stay Pending Review on Certiorari was denied on August 2, 1976.

II.

Statement of Facts

Father Flanagan's Boys' Home, a Nebraska charitable corporation, operates a home for orphaned or troubled boys at Boys Town, near Omaha, Nebraska. The Home is located on a farm of approximately 950-1000 acres

(151:24).[3] The site was deliberately chosen to give the boys, who are predominately from urban backgrounds (133:6-14), a rural environment that would include working on a farm (6:13-20; 133:15-134:8). Farm work is considered to be a part of the Home's educational process, which is both formal and informal (4:5), and a significant proportion of the boys at the Home do farm work voluntarily or for disciplinary reasons (7:13-23).

The Home employs seven men who conduct farming operations with the assistance of the boys (9:16-22; 11:22-12:5). However, the farm is operated to provide maximum participation for the boys (130:2-24) and records are kept of their participation (134:8). Some of the seven employees conduct classes for the boys, and the boys' work is evaluated for their house panels (141:9-20). The farm is not a commercial operation. Crops are normally raised to support a dairy herd which provides milk for use at the Home, but at the present time restrictions by the health authorities have made it necessary to sell the milk and excess crops (131:15-132:18).

The Home operates an accredited school system for grades three through twelve (6:3). Most of the boys at the Home have some learning or communication problem and are older than students normally would be in those

3 References herein to questions, answers, objections, motions, rulings or any other matters found in the Bill of Exceptions are made by setting forth in parentheses the numbered page in the Bill of Exceptions where found, as for example (156:12). The number preceding the colon represents the page of the Bill of Exceptions where found and the number following the colon the line. References to exhibits in the Bill of Exceptions are made by setting forth in parentheses the capital letter E, followed by the number of the exhibit where the exhibit was offered and received or refused, and the page where the exhibit is found, as for example (E5:92, 95).

grades (6:8). The school has offered a vocational agricultural curriculum continously since 1948 (8:5-17; 158:3-159:1). Apparently through error (174:23) the reports of the Home's school programs and personnel for 1974 and 1975 to the State Department of Education do not include the assignment of a teacher to the vocational agriculture program (172:22-174:24; E30); but the testimony of the teacher himself and of the Deputy Director of Boys Town for Educational Services show that the program was offered under a certified teacher as an integral part of the school curriculum (157:12-159:1; 166:14-168:20). At present there is only one boy enrolled in the program (158:13), but that is a result of a general temporary reduction in the number of boys at the Home while interim program changes are underway (168:5-169:5). There have been twenty or more students in the course in some years (158:2; E28:162). A study done for the Home by the consulting firm Booz, Allen & Hamilton recommended that the vocational agriculture curriculum be dropped, but the Director of Boys Town, responsible for all of the activities of the Home (3:20), testified that he had authority to depart from the recommendations as he sees fit, and that the vocational agriculture curriculum will not be dropped (12:11-22). The Deputy Director for Educational Services also testified that one of his objectives is to again expand the program (168:15).

Millard School District, which includes a part of the farm belonging to Father Flanagan's Boys' Home (36:17-37:25; E5:54; E26:137) has sought to condemn 40 acres of the farm as a site for a public high school. The 40 acre site is immediately adjacent to the main farm buildings (136:16-137:4; E26:137) and is used in the educational program

of the Home, including the vocational agriculture program (135:9; 164:2-24).

The site was chosen by the School District because it is located near the center of the north half of the District and has good traffic access (23:7-11; 34:20-35:1; 64:3-17; E5:54). Prior to seeking to acquire the site, the School District had a study done to ascertain the need for a new high school (15:21-16:12; E3:16) but it made no studies pertaining to specific sites. The Superintendent of Schools testified that only two sites—the Boys Town site and the De Marco site across the road—were even considered (25:20-26:15). There is no evidence that the District ever studied the cost to develop either site or the relative suitability of either site. The President of the Board of Education, who was also a member of the Site Selection Committee (112:25-113:9), testified that the School District hired no realtors, appraisers, engineers or experts of any other sort to decide on a proper location (115:4-116:11; 127:8-22). The only study that was done concerning alternate sites (E6:56) was prepared for Father Flanagan's Boys' Home at its own cost and presented to the School District in an attempt to get the District to consider other sites (43:13-19).[4]

The study made for the Home identifies possible sites within one mile of the Boys Town site (E6:56). One of those was noncontiguous Boys Town property which the Home was willing to provide to the School District (123:

4 The Board of Education did have a study made of one of those sites in comparison to the subject site. It found the other site to be inferior to the subject site, but not unsuitable for a school (E7:66).

18). The De Marco property (identified in the study as Site B), directly across the road south of the Boys Town site, was also found to be suitable for a school, and the Superintendent of Schools for Millard School District admitted that the site met all the District's criteria for a school site (43:8-12; 44:5-10). The Superintendent, who admitted that he is "not a real estate person," estimated —without stating the basis for his estimate—that purchase and development of the De Marco property would cost $200,000 more than for the Boys Town site (45:11-46:1), but the architects and engineers who prepared the study estimated the additional development cost at less than $40,000 more than the Boys Town site—$126,900 as opposed to $88,000 (E6:56). (The total cost of construction was stated by the Superintendent of the Millard School District to be $4.5 million (59:15).) The study also shows that two other suitable sites for a school exist within one mile of the Boys Town site (96:9-97:16).

A witness expert in school site selection and school design (and employed by the architectural firm hired by the Millard School District to design the high school proposed for the subject site (80:18; 85:14)) testified that in his opinion the De Marco site is a satisfactory school site and is superior to the Boys Town site as a school location because the traffic access is better (91:12-95:5; E25:95). He also testified that either of the other two alternative sites would be superior to the Boys Town site from the point of view of traffic separation (96:9-21; 97:8).

The records of the Millard School District show that the School Board conveyed away an eighty-acre tract within the northern half of the District in 1972 and voted not to accept another 80 acres in the northern half of the District offered by District 67, an adjacent school district (E36 and 37:177).

REASONS FOR GRANTING THE WRIT

I.

The condemnation power is limited by the rights of citizens guaranteed by the Constitution of the United States.

The cornerstone of the American legal system is that the Constitution of the United States is the supreme law of the land. *See Constitution of the United States,* Art. VI; *McCulloch v. The State of Maryland,* 17 U. S. (4 Wheat.) 316, 405, 4 L. Ed. 579 (1819). As Justice Marshall said in *McCulloch:*

> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. . . . But this question is not left to mere reason; the people have, in express terms, decided it by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land."

See also Smith v. O'Grady, 312 U. S. 329, 331, 61 S. Ct. 572, 85 L. Ed. 859 (1941), in which the United States Supreme Court, on writ of certiorari to the Supreme Court of the State of Nebraska, said "That Constitution is the supreme law of the land, and 'Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution.' "

II.

Condemnation of the subject property would take private school property for public school use in violation of the constitutional right to a private rather than a public education, and therefore was properly enjoined.

A. Parents and custodians of children have a constitutional right to provide a private school education for children in their care.

The "liberty" clause of the Fourteenth Amendment to the Constitution of the United States protects the rights of parents and guardians to educate their children as they see fit, *Meyer v. Nebraska,* 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1922) (statute forbidding teaching of foreign languages in schools before the eighth grade and forbidding conducting classes in a foreign language held unconstitutional); *Pierce v. Society of Sisters,* 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925) (holding unconstitutional an Oregon statute that made it a misdemeanor to fail to send children to public schools). The right of parents and guardians to educate their children as they see fit includes the right to have children educated in private rather than public schools, *Pierce v. Society of Sisters, supra.*

See Norwood v. Harrison, 413 U. S. 455, 461, 37 L. Ed. 2d 723, 43 S. Ct. 2804 (1973); *Roe v. Wade,* 410 U. S. 113, 153, 35 L. Ed. 2d 147, 93 S. Ct. 703 (1972); *Wisconsin v. Yoder,* 406 U. S. 205, 213, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972).

B. The Home has standing to enforce the constitutional right to a private education.

Father Flanagan's Boys' Home, as custodian of the children who attend its schools, stands in the relationship of parent to them and possesses the rights guaranteed under *Pierce* and the succeeding cases. Even if it did not, an action to protect those rights could be brought by the school. In *Pierce v. Society of Sisters, supra,* an action was brought by two private educational institutions to prevent enforcement of an Oregon statute requiring every parent, guardian or other person having custody of a child between eight and sixteen years of age to send him to public school. A three-judge Federal District Court granted the injunction, and the Supreme Court affirmed. Other courts have relied upon *Pierce* in holding that school officials have standing to bring an action to protect the rights of school children and their parents. *E.g., Akron Bd. of Ed. v. State Bd. of Ed. of Ohio,* 490 F. 2d 1285, 1289 (6th Cir. 1974); *Brewer v. Hoxie School Dist. No. 46,* 238 F. 2d 91, 104 (8th Cir. 1956). The general rule upon which this result is based is that where there is a close relationship between a plaintiff and the class of persons whose rights are violated, standing will be found. *Akron Bd. of Ed. v. State Bd. of Ed. of Ohio, supra* (citing cases). Thus, the Home is a proper party to bring this action.

C. The condemnation of the subject property by the Millard School District would violate the constitutional rights of the Home, the students in its schools and the parents of the children.

It is clear from the *Pierce* case a state cannot force substitution of public schools for private. In *Pierce* the state attempted to force the substitution by requiring parents to send their children to public schools. That was

held unconstitutional. Certainly the state cannot instead force the substitution by condemning all private schools. "While a State may posit educational standards, it may not preempt the educational process by requiring children to attend public schools." *Norwood v. Harrison, supra,* 413 U. S. at 461, 37 L. Ed. 2d at 729. There is a difference between condemnation of all private schools and condemnation of a portion of one school. The difference is only in the method, not the effect. The right to private education is not so immediately infringed in the latter case but it is as effectively infringed. The right is as much infringed when it is picked away piecemeal as if the state had grasped it at once.

The District Court found that the land sought to be condemned is being used by a private school for educational purposes and held that even the nonclassrom use is an "educational" use. In the present case the Supreme Court of Nebraska stated that the Home is "a private nondenominational, charitable, educational institution . . ." and that the Home "chose a rural location . . . in order to give the boys a rural environment as a part of the edupurposes and held that even the nonclassroom use is an cational process." *Father Flanagan's Boys' Home v. Millard School District, School District No. 17 of Douglas County, Nebraska, et al.,* 196 Neb. 299, 302, 242 N. W. 2d 637 (1976). The Court also referred to the Home's "formal vocational agricultural program." *Id.* In *Ancient and Accepted Scottish Rite v. Board of Commissioners,* 122 Neb. 586, 593, 241 N. W. 93 (1932) (holding that a Masonic Temple used for Masonic rites is used for "educational" purposes), the Supreme Court of Nebraska stated that "education" is not limited to classroom instruction,

but embraces "the whole course of training—moral, intellectual and physical." The very purpose of existence for Father Flanagan's Boys' Home is perfectly summarized in those words. The Home takes boys who are not always educable in the public schools and tries to educate and make useful citizens of them. What its boys receive is not merely classroom education, but an education in living. The farm ground is as important to that function as a classroom.

There can be no doubt, then, that a forced taking of the subject property would directly infringe upon private education in order to provide for a public school.

D. Where condemnation would infringe upon constitutional rights, it must be shown that no reasonable alternative is available. Reasonable alternatives are available in this case.

The United States Supreme Court has held that a state may in certain circumstances unavoidably infringe upon the liberties of its citizens, but this may be done only where the rights are shown to be subordinate to a compelling state interest. *E. g., Wisconsin v. Yoder,* 406 U. S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) (compulsory school attendance may not be required where contrary to religious scruples of parents); *Bates v. Little Rock,* 361 U. S. 516, 524, 4 L. Ed. 2d 480, 80 S. Ct. 412 (1960) (held no sufficient state interest to justify disclosure of membership lists, which disclosure would deter free association).

The state interest is then balanced against the rights infringed. As the United States Supreme Court stated in *Wisconsin v. Yoder, supra,* "Thus, a State's interest

in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests. . . ." 406 U. S. at 214, 32 L. Ed. 2d at 24.

The same test has been applied by the Supreme Court of Colorado where a condemnation proceeding would infringe upon the liberties of citizens. In *Pillar of Fire v. Denver Urban Renewal Authority,* 409 P. 2d 1250 (Colo. 1973), it was held that the First Amendment guarantee of free exercise of religion may limit or prevent the taking of church property by eminent domain. The court ruled that where property is used for religious purposes, the taking must be justified by some compelling state interest. On remand, the trial court made a factual determination that the property involved in *Pillar of Fire* was not being used for church purposes. The Supreme Court of Colorado affirmed the trial court's factual determination in *Denver Urban Renewal Authority v. Pillar of Fire,* No. 26630 (Colo., filed July 6, 1976). In *Order of Friars v. Denver Urban Renewal Authority,* 527 P. 2d 804 (Colo. 1974), the court held that the same test applied to church property having no religious importance or use itself, but which was used as a parking lot for a church, and that condemnation could proceed only after a judicial finding that there was a substantial public interest that could not be accomplished "through any other reasonable means." There is no compelling state interest in the erection of a public school on the site concerned in the present case. Numerous other suitable sites are available. The School District has the power to condemn other sites where it will not interfere with private education. Even if it be assumed for purposes of argument that none of the alternative sites are

as desirable to the School District as the site it now seeks to condemn, the relative convenience of one site over another does not amount to a compelling state interest in placing a school on the more convenient site. Nevertheless, at least one site, which an engineering expert testified is superior to the selected property as a site for a school, could be developed at a cost only insignificantly greater than the cost of the Boys Town site.

CONCLUSION

The constitutional right to private rather than public education is a fundamental right of free citizens. Clearly the state has the right to condemn property for use as a public school. However, the right of eminent domain must be balanced against the right of citizens to educate their children in private schools. If the judgment of the Nebraska Supreme Court is sustained, the Millard School District would be permitted to subordinate private education to public education without balancing any constitutional provision other than those relating to just compensation and due process of law. By ruling that the state may "proceed at will" with the condemnation of private school property so long as the use is public, just compensation is paid and due process of law observed, the Nebraska Supreme Court ignored the crucial issue: Is the state's legitimate power to condemn immune from *all* of the rights guaranteed by the Constitution of the United States? *See Father Flanagan's Boys' Home v. Millard School District, School District No. 17 of Douglas County, Nebraska, et al.*, 196 Neb. 299, 302, 242 N. W. 2d 637, Appendix A, page 21, *infra.* Since the Constitution is the supreme law of the land, no power of the government can

be unchecked by it. If rights guaranteed by the Constitution of the United States are to have meaning, governmental powers cannot be immune from the balancing of constitutional limitations. Even though the Millard School District seeks to condemn only a portion of a private school in this case, the constitutional right to private education is infringed.

The petitioner does not deny the power of the state to condemn private school property. Before private school property may be taken for a public school, the condemnor ought to and must undertake the simple task of showing that it had no reasonable alternative to infringement of a constitutional right. This is not a heavy burden. The District Court offered the Millard School District the opportunity to make such a showing and the School District declined. The reason that the Millard School District declined the opportunity to make the showing is evident from the record; a number of alternative sites are available in the immediate area.

For the foregoing reasons, the petitioner submits that this Court should issue a writ on certiorari to review the opinion and judgment of the Supreme Court of Nebraska entered in this proceeding on June 2, 1976.

Respectfully submitted,

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August 18, 1976

IN THE

Supreme Court of the United States

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Petitioner,

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APPENDICES

APPENDIX A

(Filed June 2, 1976)

40590

IN THE SUPREME COURT OF NEBRASKA

FATHER FLANAGAN'S BOYS' HOME

vs.

MILLARD SCHOOL DISTRICT

1. The power of eminent domain is an attribute of sovereignty which exists independently of constitutional pro-

vision. Constitutional provisions relating to the power of eminent domain are limitations on the exercise of the power as distinguished from a grant.

2. The constitutional limitations upon the exercise of the power of eminent domain are that the use must be public, just compensation must be paid, and due process of law observed. Within these limits, the state acting through the department or agency authorized to exercise the power, may proceed at will.

3. The power of eminent domain includes the discretion to determine the necessity of exercising the power and the location of the site to be taken.

4. Generally the discretion involved in the exercise of the power is not subject to judicial review unless the taking is fraudulent, in bad faith, or an abuse of discretion; the taking is for a private purpose; or an excessive amount of property is sought to be condemned.

Heard before White, C. J., Spencer, Boslaugh, McCown, Newton, Clinton, and Brodkey, JJ.

BOSLAUGH, J.

This is an action by Father Flanagan's Boys' Home to enjoin the defendant school district from condemning a 40-acre tract of land owned by the plaintiff. The trial court permanently enjoined the defendant from prosecuting condemnation proceedings against the land. The defendant appeals.

The defendant is a public school district, School District No. 17 of Douglas County, Nebraska, and is known as the Millard School District. It covers approximately

35 square miles of territory in Douglas and Sarpy Counties. The northern area of the district is bounded generally by Blondo Street, 132nd Street, West Center Road, and 168th Street. It had 8,133 students enrolled in its schools in 1975 and its estimated enrollment in 1979 will exceed 13,000.

In 1975 the defendant's board of education determined that it was necessary to construct a new senior high school in the northern area of the district. The board selected the site owned by the plaintiff which is on the northwest corner of 144th and Pacific Streets and is near the geographical center of the northern area of the school district. The defendant was unable to purchase the tract from the plaintiff, so on October 6, 1975, the board adopted a resolution to condemn the property. A petition for the appointment of appraisers was filed on October 21, 1975. This action was filed on November 13, 1975. The other defendants are the members of the defendant's Board of Education and the appraisers appointed by the county judge.

The plaintiff alleged that the land which the defendant district wants to condemn is an integral and necessary part of the agricultural training program which the plaintiff conducts in the schools which it operates; that if the defendant were allowed to condemn the plaintiff's property it would establish a priority of public education over private in contravention of the constitutional rights of the minor students enrolled in its schools; that condemnation of the property is not authorized by law because the property is already being used for the public benefit through the education of minor children; and the condemnation was not authorized because the defendant has no present

or reasonably foreseeable future need for the property for use as a public school.

The trial court found there was a present need for a high school in the northern area of the district and the defendant had shown a substantial interest or need for the property in question. The trial court further found that the defendant had failed to show there was not a "reasonable alternate means of accomplishment." This latter finding gives rise to the principal issue on this appeal.

The plaintiff is a private, nondenominational, charitable, educational institution which serves as a home and school for orphaned, indigent, and otherwise underprivileged boys. The services it performs in this area are known over the entire world. The plaintiff has a present enrollment of approximately 350 boys.

Father Flanagan's Boys' Home chose a rural location for the home in order to give the boys a rural environment as a part of the educational process. In addition to the formal vocational agricultural program, many of the boys do farm work voluntarily or for disciplinary reasons.

The plaintiff owns and operates 950 to 1,000 acres of agricultural property and employs 7 persons full time for this purpose. In addition to farming the land the plaintiff has a dairy and feeding operation. The milk from the dairy operation and surplus crops are sold on the commercial market.

There are no buildings located on the 40-acre tract which the defendant seeks to condemn although the dairy and the farm headquarter buildings are located on the

northern portion of the same section of land. The 40-acre tract has been used for row crops since the plaintiff has owned it.

The power of eminent domain is an attribute of sovereignty which exists independently of constitutional provision. Constitutional provisions relating to the power of eminent domain are limitations on the exercise of the power as distinguished from a grant. May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

The constitutional limitations upon the exercise of the power of eminent domain are that the use must be public, just compensation must be paid, and due process of law observed. Within these limits, the state, acting through the department or agency authorized to exercise the power, may proceed at will.

The legislative authority for the defendant's right to exercise the power of eminent domain is found in section 79-4,107, R. R. S. 1943. The only legislative restriction on the exercise of this power is that a school site must not exceed 50 acres and public parks and county or district fairgrounds may not be condemned. § 79-4,114, R. S. Supp., 1974.

The power of eminent domain includes the discretion to determine the necessity of exercising the power and the location of the site to be taken. Hammer v. Department of Roads, 175 Neb. 178, 120 N. W. 2d 909; May v. City of Kearney, *supra*. Generally the discretion involved in the exercise of the power is not subject to judicial review unless the taking is fraudulent, in bad faith, or an abuse of discretion; the taking is for a private purpose; or an excessive amount of property is sought to be condemned. May v. City of

Kearney, *supra*. As a general rule property used for religious purposes or for private school purposes is subject to condemnation for public use, 26 Am. Jur. 2d, Eminent Domain, § 78, p. 736; 29A C. J. S., Eminent Domain, § 65, p. 311.

The decision of the trial court appears to have been based primarily upon two Colorado cases cited by the plaintiff, Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P. 2d 1250, and Order of Friars, Etc. v. Denver Urban Renewal Authority, 186 Colo. 367, 527 P. 2d 804.

In the Pillar of Fire case the Urban Renewal Authority sought to condemn a church which had been the founding place for the Pillar of Fire religion. In the Order of Friars case the Urban Renewal Authority sought to condemn the parking lot of a church that had been designated an historical landmark. In these cases the Colorado court emphasized the unique nature of the property sought to be condemned and held that the Urban Renewal Authority could not proceed with condemnation proceedings in the absence of a showing that there was a substantial public interest that could not be accomplished "through any other reasonable means."

It is unnecessary in this case to decide whether the rule adopted by the Colorado court in the Pillar of Fire case is valid in this state because such a rule is not applicable to the facts in this case. There is nothing unique about the 40-acre tract of farmland owned by the plaintiff which is involved in this case. The loss of this property will not interfere substantially in any way with the operation of the plaintiff's school program. The plaintiff will have more

than 900 acres of agricultural land remaining after the taking and there is nothing in the record to suggest that this remaining land will not be adequate for school purposes.

The judgment of the District Court is reversed and the cause remanded with directions to vacate the injunction and dismiss the action.

REVERSED AND REMANDED
WITH DIRECTIONS.

APPENDIX B

(Filed December 31, 1975)

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DOC. 699 NO. 55

FATHER FLANAGAN'S BOYS' HOME,

Plaintiff,

vs.

MILLARD SCHOOL DISTRICT, et al.,

Defendants.

MEMORANDUM

This case involves a confrontation of sort between public education and private education.

The Millard School District seeks to condemn forty acres of land owned by Father Flanagan's Boys' Home for the purpose of constructing a high school.

The Millard School District covers an area of thirty-five square miles.

The northern area of the District is bounded, generally, on the North by Blondo street, on the East by 132nd street, on the South by West Center Road and on the West by 168th street. The land under consideration is located at 144th and Pacific—near the center of the northern area of the District.

That the Millard School District is one of the fastest growing school districts in the State cannot be disputed. In 1965 student enrollment totalled 1,877; in 1975 the student enrollment totalled 8,133. In 1979 it is estimated that student enrollment will exceed 13,000. The need for a high school in the northern area of the District is present.

Father Flanagan's Boys' Home is a private, nondenominational, charitable, educational institution which serves as a home and a school for orphaned, indigent and otherwise underprivileged boys.

Boys' Town is known the world over and it would serve no purpose to detail here the operations of the institution. The Boys' Town property is located partly within the Millard School District and partly within the Omaha School District.

Boys' Town has agricultural lands that surround the Home and School and Father Robert Hupp, the present Director of Boys' Town explained the purpose for which those lands exist:

> "Well I think the purpose goes right back to the very beginning at the time when Father Flanagan bought the farm, to have a place to give boys a total life experience that would include working outdoors and working on a farm, and also classroom education.

> We may have refined some of those areas a little bit, but, I don't think that we have deviated at all from that general idea."

That the agricultural land at 144th and Pacific Street is being used for educational purposes seems to be answered by our Court's definition in *Ancient and Accepted Scottish Rite v. Board of Commissioners,* 122 Neb. 586:

> "The word 'educational' in its full sense is a broad, comprehensive term and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense embraces them all, and includes not merely the instructions received at school . . . but the whole course of training—moral, intellectual and physical."

The Millard School District takes the position that under the provisions of Section 79-1414 R. R. S. 1943, it has the absolute discretion to condemn any private land within its boundaries not exceeding fifty acres with the exception of parks and fairgrounds so long as the land taken is put to a proper public use, due process is observed and just compensation paid.

This absolutist position fails to take into consideration conflicting constitutional rights which must be balanced. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. *United States v. Wunderlich,* 342 U. S. 98, 101.

This absolutist position raises interesting questions.

If the School District's absolutist position were carried to its obvious conclusion, it would seem that, at best, it would hobble forward with backward glances. For example, what would prohibit the Board of Regents of the

University of Nebraska from condemning Creighton University? Does the City of Omaha have the absolute discretion to condemn the Methodist Hospital for park purposes? What if the School District in Washington County decided that it would prefer a complex of public schools where Dana College now stands?

The issue is complex and because of the deference which condemning bodies have shown to private educational and religious institutions, the issue has not been squarely raised before in this State. A search of the legal digests covering other States has been of little help.

The State has few higher interest than the education of its future citizens; yet, in *Wisconsin v. Yoder,* 406 U. S. 205 (1972) the Supreme Court balanced conflicting interests and held that the First and Fourteenth Amendments prevented Wisconsin from compelling Amish parents to cause their children to attend formal high school to age 16.

The "liberty clause" of the Fourteenth Amendment to the Constitution has been construed to protect the rights of parents to have children educated in private rather than public schools. *Pierce v. Society of Sisters,* 268 U. S. 510.

In general accord is Article I, Section 4, of the Nebraska Constitution which reads in part: . . . Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable Laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, *and to encourage schools and the means of instruction."* (Emphasis supplied)

The more recent cases on the general subject call upon the courts to balance the interests of the parties where the

condemnee is vested with constitutional rights in the use of its property over and above the usual due process rights possessed by the private citizen in the enjoyment of his property. *Sherbert v. Verner,* 374 U. S. 398; *Order of Friars v. Denver Urban Renew. Auth.* 527 Pac. 2d. 804; *Pillar of Fire v. Denver Urban Renew Auth.* 509 P. 2d. 1250.

If the condemning body can show a substantial interest or need "without a reasonable alternate means of accomplishment," as against a less than substantial interest or need of the private educational institution, then the condemning body has the right to proceed.

This court finds that the School District has sustained its burden of showing "a substantial interest or need" of the property in question.

The court finds that the School District has not sustained its burden of showing that there is not a "reasonable alternate means of accomplishment."

Basically, only four sites were considered—all on Pacific Street between 144th and 156th. The northern area of the School District covers several square miles and no evidence was presented as to whether the remaining area would provide a reasonable alternate means of accomplishment. The fact that the Boys' Town site is a prime location does not satisfy the requirement.

Dr. Don Stroh, Superintendent of the School District, testified that 70% of the students either drive or are driven to school.

In connection with reasonable alternate sites Exhibit 36, containing the minutes of the Board of Education busi-

ness meeting of May 1, 1972, reveals that the School District transferred 80 acres of land situated north of Dodge and East of 132nd Street to the Omaha Public Schools; Exhibit 37, containing the minutes of the Board of Education meeting of April 2, 1973, reveals that the School District voted not to accept 80 acres of land from School District 67. Both parcels of land were located in the northern area of the School District.

This court, at the option of the School District, will

(a) Enter forthwith a permanent injunction enjoining the condemnation in order to enable a prompt appeal to the Supreme Court for a determination of this important issue, or

(b) Will grant a further hearing on the issue as to whether or not other land in the northern area of the District would provide a reasonable alternate means of accomplishment.

DECEMBER 31, 1975

BY THE COURT

JOHN C. BURKE
DISTRICT JUDGE

APPENDIX C

(Filed January 9, 1976)

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DOC. 699 NO. 55

FATHER FLANAGAN'S BOYS' HOME,

Plaintiff,

vs.

MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT NO. 17 OF DOUGLAS COUNTY, NEBRASKA, ROBERT BARTELS, LOWELL BOETGER, HOUGHSTON TETRICK, ROBERT ACKERMAN, DONNA BLACK, CHARLES HASKINS, JAMES H. MOYLAN, WILLIAM L. OTIS and JOSEPH KIRSHENBAUM,

Defendants.

JUDGMENT AND INJUNCTION

Now on this 5th day of January, 1976, this cause came on for decision the same having been tried upon the Petition, Answer, and evidence and the Court having filed its Memorandum and Decision herein and having found in favor of the Plaintiff and against the Defendants on the pleadings and the evidence and having found the Plaintiff entitled to the injunction in accordance with the prayer in its Petition;

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the County Court of Douglas County, Nebraska, hereby stay condemnation proceedings and the Defendants and each of them be and are hereby permanently enjoined from prosecuting condemnation proceedings against the 40 acres on the northwest corner of 144th and Pacific Streets, Omaha, Nebraska, the same being:

the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section 23, Township 15, Range 11 East of the 6th Prime Meridian, in Douglas County, Nebraska.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED by the Court that the Plaintiff recover from the Defendants its costs expended herein.

BY THE COURT:

/s/ John C. Burke

Dated this 9th day of January, 1976.

APPENDIX D

(Dated July 23, 1976)

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

Sitting at Lincoln January Term, 1976 to the District Court of the Fourth Judicial District, sitting in and for the County of Douglas Greeting:

Whereas, in a late action before you, wherein Father Flanagan's Boys' Home was plaintiff and Millard School District, School District No. 17 of Douglas County, Nebraska; Robert Bartels; Lowell Boetger; Houghston Tetrick; Robert Ackerman; Donna Black; Charles Haskins; James H. Moylan; William L. Otis; and Joseph Kirshenbaum were defendants, a judgment was rendered by you, upon a transcript of which record and proceedings in your said Court, the said defendants prosecuted an appeal to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court during the January Term, A. D. 1976, it was considered by said Court, a certified copy of the opinion of this Court being hereto attached and made a part hereof, that the judgment rendered by you be reversed at the costs of said appellee taxed at $115.43 and the cause remanded with directions to vacate the injunction involved and dismiss the action.

Now, Therefore, You are commanded, without delay, to proceed in conformity with the judgment and opinion of this Court.

Witness, The Hon. Paul W. White, Chief Justice and the Seal of said Court, this 23rd day of July, 1976.

Geo. H. Turner
Clerk

By /s/ Larry D. Donelson
Deputy

APPENDIX E

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ORDER

SUPREME COURT OF NEBRASKA

JANUARY TERM, A. D. 1976

July 23, 1976

FATHER FLANAGAN'S BOYS' HOME

Appellee,

vs.

MILLARD SCHOOL DISTRICT, ET AL.,

Appellants.

Appeal from the District Court for Douglas County.

No. 40590.

This cause coming on to be heard upon motion of appellee for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no prob-

able error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

APPENDIX F

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ORDER

THE SUPREME COURT OF NEBRASKA

JANUARY TERM, A. D. 1976

July 23, 1976

FATHER FLANAGAN'S BOYS' HOME,

Appellee,

vs.

MILLARD SCHOOL DISTRICT, ET AL.,

Appellants.

Appeal from the District Court for Douglas County.

No. 40590.

This cause coming on to be heard upon motion of appellee for stay of mandate was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and hereby is, overruled.

In The

Supreme Court of the United States

October Term, 1976

No. 76-250

FATHER FLANAGAN'S BOYS' HOME,

Petitioner,

vs.

MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT NO. 17 OF DOUGLAS COUNTY, NEBRASKA; ROBERT BARTELS; LOWELL BOETGER; HOUGHSTON TETRICK; ROBERT ACKERMAN; DONNA BLACK; CHARLES HASKINS; JAMES H. MOYLAN; WILLIAM L. OTIS; and JOSEPH KIRSHENBAUM,

Respondents.

RESISTANCE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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In The

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Respondents.

RESISTANCE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Respondents respectfully resist the Petitioner's Petition for Writ of Certiorari to the Supreme Court of the United States for the reason that the Petitioner has failed to allege or establish grounds in its Petition and Brief to warrant a review by Writ of Certiorari in that there are no constitutional or other federal questions involved and the issues have been duly adjudicated by the Supreme Court of Nebraska.

QUESTIONS PRESENTED

The questions raised are:

1. Whether certiorari should be granted where the Supreme Court of Nebraska has found as fact that the taking of the 40 acres of farmland will not substantially interfere in any way with the Petitioner's school programs.

2. Where the State Courts have found that the condemning authority has a need for the property, is there any constitutional prohibition to taking for public use property owned by a private school under the legislative power of eminent domain.

———o———

STATEMENT OF THE CASE

The issue is whether there is a constitutional prohibition to the taking by a school district for a public school site under the legislative power of eminent domain of 40 acres of farmland, owned by a private school and farmed by seven (7) of the school's employees for commercial purposes.

Pursuant to the appropriate statutes, the Respondents instituted condemnation proceedings. The proceedings thereafter were enjoined by the District Court of Douglas County, Nebraska.

On appeal by the Respondents to the Supreme Court of Nebraska, the judgment of the District Court was reversed and the cause remanded with directions to vacate the injunction and dismiss the action.

On June 18, 1976, the Petitioner filed a Motion for Rehearing and Application for Stay of Mandate with the Supreme Court of Nebraska, both of which were denied on July 23, 1976. The Mandate to the District Court was issued on July 23, 1976.

The Petitioner filed an Application for Stay of Mandate Pending Review on Certiorari, addressed to Mr. Justice Blackmun, on July 29, 1976, which was denied on August 2, 1976.

———o———

STATEMENT OF FACTS

Under Section 25-1925 R. R. S., 1943, on appeal of an equity case from the District Courts to the Supreme Court of Nebraska, the Supreme Court retries the issues and evaluates the facts upon the record at trial for the purpose of reaching an independent conclusion as to the facts and the issues.

The District Court had found that the Respondent has a need for a high school in the area and had a substantial interest in and need for the property in question.

Upon the record, the Supreme Court found that the Petitioner owns and operates 950 to 1,000 acres of agricultural property and employs seven (7) persons full-time for this purpose; that many of the boys do farm work voluntarily or for disciplinary reasons; that the milk from the dairy operation and the surplus crops not used in the dairy operation are sold on the commercial market; that there are no buildings located on the 40-acre tract which

has always been used for row crops; that there is nothing unique about the 40-acre site; and that the loss of the 40 acres will not substantially in any way interfere with the Petitioner's school programs. *Father Flanagan's Boys' Home v. Millard School District, et al.,* 196 Neb. 299, 242 N. W. 2d 637 at pages 639 and 640 (1976).

The Supreme Court of Nebraska further held that the discretion of the condemning authority includes the discretion to determine the necessity and extent of exercising the power of eminent domain and the location of the site to be taken; that property used for educational purposes is subject to condemnation for public use; and that the Colorado law pertaining to reasonable alternate means was not applicable to the facts in the case. *Father Flanagan's Boys' Home v. Millard School District, et al.,* 196 Neb. 299, 242 N. W. 2d 637 at page 640 (1976).

ARGUMENT

I.

A review of Writ of Certiorari will not be granted where there is no showing that the Supreme Court of Nebraska decided a federal question of substance not previously decided by the Court or decided a federal question in a way probably not in accord with applicable decisions of the Court.

The Supreme Court of Nebraska, after a review of the record de novo, found that there was nothing unique

in the 40-acre tract of farmland owned by the Petitioner; that the loss of the property would not interfere substantially in any way with the operation of the Petitioner's school programs; that the Petitioner would still have more than 900 acres of agricultural land; and that there is nothing in the record to suggest that the remaining land would not be adequate for school purposes.

The findings of fact of the Supreme Court of Nebraska do not present any constitutional questions.

None of the findings of fact fall within the purview of Rule 19 of the Revised Rules of the Supreme Court of the United States, 28 U. S. C. A. Rule 19 embodies the criteria by which the Court determines whether a particular case merits consideration, particularly with regard to the limited reviewing power to which the Supreme Court is confined. *Rice v. Sioux City Memorial Park Cemetery,* 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

Each of the Questions Presented, as set forth in the Petition for Writ of Certiorari, is answered by the factual determination of the Supreme Court of Nebraska. The Court did not decide any federal questions of law not heretofore determined by the Supreme Court of the United States nor was its decision in any way probably not in accord with applicable decisions of this Court.

Where the highest court of a state has made findings of fact and decided issues in accordance with the state law, great weight and highest respect should be accorded such findings of fact and applications of state law. *O'Neill v. Leamer,* 329 U. S. 244, 36 S. Ct. 54 (1915); *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U. S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950); *Mayor of the City of Philadelphia*

v. Educational Equality League, 415 U. S. 605, 94 S. Ct. 1323, 39 L. Ed. 2d 630 (1974). The Supreme Court of the United States does not reexamine local law as applied by the local courts. *Skelly Oil Co. v. Phillips Petroleum Co.,* supra.

The Supreme Court of Nebraska held that the power of eminent domain is a legislative matter, not subject to judicial review or supervision, and that the power of eminent domain includes the discretion to determine the necessity of exercising the power and the location of the site to be taken and cited in support of its decision. *Hammer v. Department of Roads,* 175 Neb. 178, 120 N. W. 2d 909 (1965) and *May v. City of Kearney,* 145 Neb. 475, 17 N. W. 2d 448 (1945). The decision is in accord with the previous holdings not only of the Supreme Court of Nebraska but also of the Supreme Court of the United States with specific reference to the law on eminent domain, as shown in *Bragg v. Weaver,* 251 U. S. 75, 40 S. Ct. 245, 62 L. Ed. 688 (1918).

II.

Condemnation of property owned by a private school does not contravene any constitutional rights.

Neither the Fourteenth Amendment nor the Federal Constitution in any manner denies to the State the right of eminent domain. *O'Neill v. Leamer,* supra.

The constitutional limitations on the exercise of the power of eminent domain are that the use for which the property is taken must be public, that compensation must be made for property taken, and that due process of law

must be afforded to all parties. *May v. City of Kearney,* supra; *Tyson v. Washington County,* 78 Neb. 211, 110 N. W. 2d 634 (1907); *Burger v. City of Beatrice,* 181 Neb. 213, 148 N. W. 2d 784 (1967).

The Petitioner has never contended, either by question or argument, that the acts of the Respondents violate any of the above-stated constitutional limitations on the exercise of the power of eminent domain.

Under Section 79-4,107, R. S., 1943, the State legislature granted to school districts the right to exercise the power of eminent domain for the purpose of acquiring property for use as school sites. The Court will not review the discretion of the condemning authority in the exercise of eminent domain. *O'Neill v. Leamer,* supra; *Sears v. Akron,* supra; *Bragg v. Weaver,* supra.

In its decision, the Supreme Court of Nebraska held that, as a general rule, property used for religious purposes or for private school purposes is subject to condemnation for public use and cited in support thereof 26 Am. Jur. 2d, Eminent Domain, Section 78, p. 736 and 29A C. J. S., Eminent Domain, Section 65, p. 311. *Father Flanagan's Boys' Home v. Millard School District, et al.,* 196 Neb. 299, 242 N. W. 2d 637 at page 640 (1976).

Further, as stated by the District Court, the Respondent has a substantial need for and interest in the property in question. The Supreme Court of Nebraska found that the loss of the 40-acre site by eminent domain will not substantially in any manner interfere with the Petitioner's school programs.

———o———

CONCLUSION

The Respondents respectfully submit that the Supreme Court should not grant a review of the present matter by Writ of Certiorari for the reasons that the Petitioner has failed to establish grounds for review either under the facts or the law on eminent domain, as adjudicated by the Supreme Court of Nebraska and by previous decisions of this Court. Under the facts as found by the Supreme Court of Nebraska, a taking by eminent domain of 40 of the 1,000 acres of farmland did not effectuate a substitution of public over private education.

Respectfully submitted,

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